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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 396

CITY OF MORGANTOWN, WEST VIRGINIA, A MUNICIPAL CORPORATION, PETITIONER,

vs.

ROYAL INSURANCE COMPANY, LIMITED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 4, 1948.

CERTIORARI GRANTED DECEMBER 13, 1948.

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Plaintiff,

vs.

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Defendant

COMPLAINT—Filed October 29, 1947

1. The plaintiff Royal Insurance Company, Limited, is a corporation organized and existing under the laws of the Kingdom of Great Britain and Ireland, having its principal office and place of business in the City of Liverpool, England. The plaintiff has for many years been, and is now, duly qualified, admitted, and licensed to do business as a foreign insurance corporation in the State of West Virginia.

2. The defendant City of Morgantown, West Virginia, is a municipal corporation organized and existing under the laws of the State of West Virginia, and is the county seat of Monongalia County, West Virginia, located in the Northern District of West Virginia. The defendant is, therefore, a citizen and resident of Monongalia County, in the Northern District of West Virginia.

3. The amount in controversy in this action exceeds, exclusive of interest and costs, the sum of $3,000.00.

[fol. 3] 4. This Court has jurisdiction of the action under the provisions of 28 USCA 41 (1) by reason of diversity of citizenship. The Court also has jurisdiction under the Declaratory Judgment Act, 28 USCA 400.

5. On the 22nd day of March, 1946, the plaintiff, through W. F. Naret, its local agent at Morgantown, West Virginia, wrote and issued to the defendant plaintiff's policy No. 251470, in the amount of $22,000.00, insuring the defendant for a term of one year from March 22, 1946, to March 22, 1947, against loss by windstorm and hail (but not fire) on the so-called "city hangar," located at the Morgantown airport near the City of Morgantown, West Virginia. The

policy was originally written at the premium rate of 15¢ per $100.00, but on May 11, 1946, there was attached to the policy an endorsement noting increase of the rate from 15¢ to 20¢, thereby making the premium rate for the windstorm and hail coverage $44.00 per year, instead of $33.00 per year.

There is attached hereto, as "Exhibit A," a photostatic copy of a portion of the face of said policy No. 251470, bearing upon the peril insured against by said policy. There were attached to policy No. 251470, when written and issued, standard West Virginia endorsements applicable to windstorm and hail policies (as distinguished from fire insurance policies), known as "Tornado Form No. T2" and "Windstorm and Hail Endorsement Clause No. 54."

The windstorm and hail policy No. 251470, issued on March 22, 1946, expired according to its terms on March 22, 1947.

6. At or prior to the time the aforesaid policy No. 251470 expired on March 22, 1947, plaintiff's local Morgantown [fol. 4] agent, W. F. Naret, wrote and issued to the defendant a renewal policy No. 262500 in the amount of $22,000.00 on the said "city hangar." The renewal policy was written in the same amount, at the same premium (i.e., $44.00 for a term of one year), for a like term of one year from March 22, 1947, to March 22, 1948, and with the same Tornado Form No. T2 and Windstorm and Hail Endorsement Clause No. 54, as was the original windstorm and hail policy No. 251470. A photostatic copy of a portion of the face of the said renewal policy No. 262500, showing certain entries thereon bearing on the coverage of the policy, is hereto attached and made a part of this complaint as "Exhibit B." The original policy No. 262500 is in the possession of the defendant.

7. It was the intention of the plaintiff in writing and issuing the renewal policy No. 262500, and of the defendant in receiving, accepting, and retaining it, to effect merely a renewal of the windstorm and hail policy No. 251470. It was not at any time the intention of the plaintiff or of the defendant to enter into a contract of fire insurance, for the insuring of the so-called "city hangar" against loss by fire. The premium chargeable for a fire insurance policy covering the said "city hangar" for a one-year term would have been $1.54 per $100.00, as compared with the premium

rate of 20¢ per $100.00 for the windstorm and hail coverage, so that the total premium for $22,000.00 fire insurance coverage for one year would have been $338.80, instead of $44.00.

8. Notwithstanding the mutual intent of the parties as aforesaid, through the mistake and inadvertence of an office assistant of plaintiff's agent, typewritten entries were made on the face of the renewal policy No. 262500 which misde-
[fol. 5] scribed the intended coverage of the policy, entries of the "amount," "rate," and "premium" being inserted in blank spaces opposite the peril of "Fire and Lightning," instead of the peril of "Windstorm and Hail," all of which appears from the photostatic copy filed herewith as "Exhibit B." The entry of such figures on policy No. 262500 should have been made in the blank spaces opposite the peril "Windstorm and Hail," in accordance with what was done in the original policy No. 251470, as appears in the photostatic copy filed herewith as "Exhibit A." It was never the intention of the defendant to purchase a fire insurance policy, nor of the plaintiff to write such a policy; and the defendant accepted and retained policy No. 262500 believing it to be what it was always intended by the parties to be—i.e., a windstorm and hail policy in renewal of the former policy No. 251470.

9. Neither the plaintiff, nor any of its agents or representatives, nor the defendant ever discovered the mistake made in the writing of defendant's renewal policy No. 262500, until after the fire of August 20, 1947, hereinafter referred to.

10. On the 20th day of August, 1947, the said "city hangar" was destroyed by fire. The building sustained no loss from windstorm or hail.

11. Sometime after the fire of August 20, 1947, the defendant, through its City Manager, Elmer W. Prince, for the first time asserted the claim that the renewal policy No. 262500 was a fire insurance policy, and that it covered defendant's fire loss of August 20, 1947, because of the aforesaid mistake made in the writing of the policy, notwithstanding the clear intent and understanding of the parties at all times prior to the loss that they were making and had entered into a contract of windstorm and hail insur-
[fol. 6] ance, and not a contract of fire insurance. On or

about September 29, 1947, in furtherance of such claim, the defendant submitted to the plaintiff a purported "proof of loss" statement, in which defendant made claim upon the plaintiff for recovery of $22,000.00 under policy No. 262500 for the loss sustained by defendant in the fire of August 20, 1947; and plaintiff is advised and believes, and now avers, that defendant is still claiming a right to recover from plaintiff upon said policy for a fire loss, contrary to the actual mutual intent and understanding of the parties that such policy was to cover only against loss by windstorm and hail, and not against loss by fire.

12. Plaintiff is advised and believes that it is entitled to have its renewal policy No. 262500 reformed and corrected, so as to make it conform to what was at all times the mutual intent and understanding of the parties prior to the fire loss of August 20, 1947—i.e., that it was to be, and was, a windstorm and hail policy, and not a fire insurance policy.

Wherefore, the plaintiff prays:

1. That in conformity with the mutual agreement, understanding, and intent of the parties as hereinbefore alleged, plaintiff's renewal policy No. 262500 be reformed and corrected by the court, so that its terms provide, as the parties mutually intended, for insurance of the city hangar against loss by windstorm and hail only, and not against loss by fire; and that upon being so reformed and corrected, the court adjudge that plaintiff is not liable to the defendant upon policy No. 262500 for the fire loss of August 20, 1947.

[fol. 7] 2. That plaintiff recover its costs against defendant.

October 28, 1947.

James M. Guiher, Donald R. Wilson, Union Bank Building, Clarksburg, West Virginia, Attorneys for Plaintiff.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

[fol. 8] EXHIBIT "A" TO COMPLAINT

1943 Standard Policy
N. C., Va., W. Va.

Agent's Record
ROYAL INSURANCE COMPANY, LIMITED

150 William Street
New York 8, N. Y.

O P

Date Effective	Reins. Company Pol: or Cession No.	Reins. Company Name	Item	Class Number	Amt. Re-ins.	Reins. Premium	Amount Canceled	Return Premium	Original Premium	Ordered By	Reins. Registered

To	Inspt. No.	Ex. Notes	Registered	Cn. Auth.	M'P'D By	App'd By

Space Above For Home Office Use

Renewal of Policy No. New Rate Est. No. Sup. No. Map. Vol. Page Blk. No. St. No.

Peril(s)	Class	Comm.	Amount	Rate	Premium
Fire and Lightning			$		$
Extended Coverage (when end't attached)			.....		$
Windstorm and Hail (when end't attached)			$22,000.00	sub. to rate .15	$ 33.00
			.....		$
Additional Coverages (when endorsement attached)				Total Premium	$ 33.00

for the term of) from the 22nd day of March 1946 (at noon, Standard Time
one year) to the 22nd day of March 1947 (
Insured City of Morgantown, Morgantown, West Va.
Give Full Copy of Written Portion of Policy

MORGANTOWN, W. VA. 49405 O P POLICY No. 251470
Agency at

[fol. 10] SUMMONS AND RETURN

To the above named Defendant:

You are hereby summoned and required to serve upon James M. Guiher and/or Donald R. Wilson, plaintiff's attorneys, whose address is Union Bank Building, Clarksburg, West Virginia, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Wm. C. Howard, Clerk of Court; by Helen B. Shaw Deputy Clerk. (Seal of Court.)

Date October 29, 1947.

Note.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

[fol. 10a] Return on Service of Writ

I hereby certify and return, that on November 1, 1947, I received the within summons at Fairmont, West Virginia and on November 3, 1947 at Morgantown, Monongalia County, West Virginia I personally delivered a true copy hereof to Elmer W. Prince, City Manager and Chief Executive Officer of the City of Morgantown, West Virginia, the within-named defendant municipal corporation.

Russell Nichols, United States Marshal, by J. Pietro Repep, Deputy United States Marshal. (Seal.)
Marshal's Fees: Travel $1.90, Service $2.00—$3.90.

U. S. District Court. Filed at Wheeling, W. Va., Nov. 7, 1947. Wm. C. Howard, Clerk.

[Endorsed:] Original, No. Civ. 420-W. District Court of the United States Northern District of West Virginia. Royal Insurance Company, Limited, a corporation, v. City of Morgantown, West Virginia, a municipal corporation. Summons in Civil Action. Returnable not later than 20 days after service. James M. Guiher, Donald R. Wilson, Attorneys for Plaintiff.

[fol. 11] IN UNITED STATES DISTRICT COURT

ANSWER AND COUNTERCLAIM—Filed November 24, 1947

ANSWER

First Defense

The complainant fails to state a claim against defendant upon which relief can be granted.

Second Defense

It is true that plaintiff's local Morgantown agent, W. F. Naret, issued to defendant on or prior to March 22, 1947, plaintiff's policy No. 262500 for the term of one year from March 22, 1947, to March 22, 1948, on the so-called "city hangar", located at the Morgantown airport near the City of Morgantown, West Virginia. The defendant denies that "Exhibit A" and "Exhibit B" are copies of portions of the faces of policies Nos. 251470 and 262500, respectively. Defendant avers that plaintiff's said policy No. 262500 was in fact a policy insuring against the peril of fire and lightning as particularly set forth on the face of plaintiff's said policy, a photostatic copy of which is attached and filed herewith as "Exhibit Policy".

Third Defense

Defendant denies that it was the intention of plaintiff in writing and issuing its policy No. 262500 and of the [fol. 12] defendant in receiving, accepting and retaining plaintiff's said policy to effect merely a renewal of the windstorm and hail policy No. 251470 dated March 22, 1946; and defendant denies that it was not at any time the intention of the plaintiff or of the defendant to enter into a contract of fire insurance for the insuring of the "city hangar" against loss by fire. The intention of the parties, the plaintiff and the defendant, clearly and unambiguously appears from the face of plaintiff's said policy No. 262500. It is true that plaintiff's policy No. 251470 expired according to its terms on March 22, 1947. Plaintiff's said policy No. 262500, dated March 22, 1947, was a new and separate contract of insurance and was not a mere extension or renewal of the former policy No. 251470. Defendant does not know whether or not the correct premium for a fire insurance policy covering the said "city hangar" for a term of one

EXHIBIT "B" TO COMPLAINT

1943 Standard Policy
N. C., Va., W. Va.

Agent's Record
ROYAL INSURANCE COMPANY, LIMITED

150 William Street
New York 8, N. Y.

O P

Date Effective	Reins. Company Pol. or Cession No.	Reins. Company Name	Item	Class Number	Amt. Re-ins.	Reins. Premium	Amount Canceled	Return Premium	Original Premium	Ordered By	Reins. Registered

To	Inspt. No.	Ex. Notes	Registered	Cn. Auth.	M'P'D By	App'd By

Space Above For Home Office Use

Renewal of Policy No. 251470 Rate Est. No. _____ Sup. No. _____ Map. Vol. _____ Page _____ Blk. No. _____ St. No. _____

Peril(s)	Class	Comm.	Amount	Rate	Premium
Fire and Lightning			$ $22,000.00	20 cents	$ 44.00
Extended Coverage (when end't attached)			.....		$
Windstorm and Hail (when end't attached)					$
			.....		$
Additional Coverages (when endorsement attached)					
				Total Premium	$ 44.00

for the term of one year) from the 22nd day of March 1947 (at noon, Standard Time
) to the 22nd day of March 1948 (

Insured City of Morgantown, Morgantown, West Va.
Give Full Copy of Written Portion of Policy

MORGANTOWN, W. VA. 49405 O P POLICY No. 262500
Agency at

year is $1.54 per $100.00, and does not know whether or not the total premium for $22,000.00 fire insurance coverage for one year is $338.80. The defendant did not know the rate for fire and lightning coverage on said hangar, and had the right to assume that the correct amount was indicated in said policy for the coverage designated therein. If the amount heretofore paid by defendant as premium for said policy is incorrect, defendant is willing to and offers to pay any balance due thereon.

Fourth Defense

Defendant denies any mutual intent of the parties to effect any other than the contract of fire insurance clearly set forth on the face of plaintiff's said policy No. 262500. Defendant denies that any mistake or inadvertence of plaintiff, or of its agent, or of its agent's office assistant, could or should be chargeable to or imputed to defendant, or that defendant could in any wise be responsible therefor. Defendant denies that typewritten entries were made on the [fol. 13] face of plaintiff's said policy No. 262500 which misdescribed the intended coverage of the policy. Defendant denies that it was never the intention of the defendant to purchase a fire insurance policy, nor of the plaintiff to write such a policy, and defendant denies that it accepted and retained plaintiff's policy No. 262500 believing it to be a windstorm and hail policy in renewal of the former policy No. 251470.

Fifth Defense

The defendant is a municipal corporation and acts only through its duly elected and appointed officers and agents, its chief executive officer being the City Manager. The practice of the defendant, through its duly authorized officer, the City Manager, is and has always been, for 20 years, at least, to effect and keep in force insurance against fire and lightning on all buildings of the City. Said windstorm policy No. 251470 was issued on March 22, 1946, at the instance of the Acting City Manager during the absence of the City Manager who was then serving in the military forces. The said City Manager, upon returning from military service to his official duties, in connection with making up the tentative budget to be submitted to the City Council for the ensuing fiscal year, required to be submitted at its last session in June, 1947, reviewed the insurance coverages on the properties of the defendant and

EXHIBIT POLICY

STANDARD POLICY

No. 262500

INCORPORATED A D 1845

ROYAL Insurance Company, Limited

STOCK COMPANY

EXECUTIVE OFFICES:
150 WILLIAM STREET

NEW YORK 8,
NEW YORK

PERIL(S)	AMOUNT	RATE	PREMIUM
Fire and Lightning	$ 22,000.	20 cents	$ 44.00
Extended Coverage (when endorsement attached)			$
Windstorm and Hail (when endorsement attached)	$		$
ADDITIONAL COVERAGES (WHEN ENDORSEMENT ATTACHED)			$
		TOTAL PREMIUM	$ 44.00

No insurance attaches in connection with the above listed Perils unless specific "Premium" therefor is specified in the face of this policy (or in endorsements attached hereto).

In Consideration of the Provisions and Stipulations herein or added hereto

and of the above stated **Dollars Premium**

this Company, for the term } from the 22nd day of March, 19 47 } at noon, Standard Time, at

of one year } to the 22nd day of March, 19 48 } location of property involved,

to an amount not exceeding with respect to each peril, the amount specified above in Dollars,

does insure City of Morgantown, Morgantown, West Virginia

and legal representatives, to the extent of the actual cash value of the property at the time of loss, but not exceeding the amount which it would cost to repair or replace the property with material of like kind and quality within a reasonable time after such loss, without allowance for any increased cost of repair or reconstruction by reason of any ordinance or law regulating construction or repair, and without compensation for loss resulting from interruption of business or manufacture, nor in any event for more than the interest of the insured, against all DIRECT LOSS BY FIRE, LIGHTNING AND BY REMOVAL FROM PREMISES ENDANGERED BY THE PERILS INSURED AGAINST IN THIS POLICY, EXCEPT AS HEREINAFTER PROVIDED, to the property described hereinafter while located or contained as described in this policy, or pro rata for five days at each proper place to which any of the property shall necessarily be removed for preservation from the perils insured against in this policy, but not elsewhere.

Assignment of this policy shall not be valid except with the written consent of this Company.

This policy is made and accepted subject to the foregoing provisions and stipulations and those hereinafter stated, which are hereby made a part of this policy, together with such other provisions, stipulations and agreements as may be added hereto, as provided in this policy.

In Witness Whereof, this Company has executed and attested these presents; but this policy shall not be valid unless countersigned by the duly authorized Agent of this Company at Morgantown, West Va.

N. O'Connell
United States Manager.

Countersigned
this 22nd day of March, 1947

W. F. Clark Agent

...void if, whether ... after a loss, the insured has wil... concealed or misrepresented any ma... circumstance concerning this insurance or the ... interest, or the interest of the insured therein, or in case ... fraud or false swearing by the insured relating thereto.

Uninsurable and excepted property. This policy shall not cover accounts, bills, currency, deeds, evidences of debt, money or securities; nor, unless specifically named hereon in writing, bullion or manuscripts.

Perils not included. This Company shall not be liable for loss by fire or other perils insured against in this policy caused, directly or indirectly, by: (a) enemy attack by armed forces, including action taken by military, naval or air forces in resisting an actual or an immediately impending enemy attack; (b) invasion; (c) insurrection; (d) rebellion; (e) revolution; (f) civil war; (g) usurped power; (h) order of any civil authority except acts of destruction at the time of and for the purpose of preventing the spread of fire, provided that such fire did not originate from any of the perils excluded by this policy; (i) neglect of the insured to use all reasonable means to save and preserve the property at and after a loss, or when the property is endangered by fire in neighboring premises; (j) nor shall this Company be liable for loss by theft.

Other insurance. Other insurance may be prohibited or the amount of insurance may be limited by endorsement attached hereto.

Conditions suspending or restricting insurance. Unless otherwise provided in writing added hereto this Company shall not be liable for loss occurring

(a) while the hazard is increased by any means within the control or knowledge of the insured; or

(b) while a described building, whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of sixty consecutive days; or

(c) as a result of explosion or riot, unless fire ensue, and in that event for loss by fire only.

Other perils or subjects. Any other peril to be insured against or subject of insurance to be covered in this policy shall be by endorsement in writing hereon or added hereto.

Added provisions. The extent of the application of insurance under this policy and of the contribution to be made by this Company in case of loss, and any other provision or agreement not inconsistent with the provisions of this policy, may be provided for in writing added hereto, but no provision may be waived except such as by the terms of this policy is subject to change.

Waiver provisions. No permission affecting this insurance shall exist, or waiver of any provision be valid, unless granted herein or expressed in writing added hereto. No provision, stipulation or forfeiture shall be held to be waived by any requirement or proceeding on the part of this Company relating to appraisal or to any examination provided for herein.

Cancellation of policy. This policy shall be cancelled at any time at the request of the insured, in which case this Company shall, upon demand and surrender of this policy, refund the excess of paid premium above the customary short rates for the expired time. This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of paid premium above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand. Notice of cancellation shall state that said excess premium (if not tendered) will be refunded on demand.

Mortgagee interests and obligations. If loss hereunder is made payable, in whole or in part, to a designated mortgagee not named herein as the insured, such interest in this policy may be cancelled by giving to such mortgagee a ten days' written notice of cancellation.

If the insured fails to render proof of loss such mortgagee, upon notice, shall render proof of loss in the form herein specified within sixty (60) days thereafter and shall be subject to the provisions hereof relating to appraisal and time of payment and of bringing suit. If this Company shall claim that no liability existed as to the mortgagor or owner, it shall, to the extent of payment of loss to the mortgagee, be subrogated to all the mortgagee's rights of recovery, but without impairing mortgagee's right to sue; or it may pay off the mortgage debt and require an assignment thereof and of the mortgage. Other provisions relating to the interests and obligations of such mortgagee may be added hereto by agreement in writing.

Pro rata liability. This Company shall not be liable for a greater proportion of any loss than the amount hereby insured shall bear to the whole insurance covering the property against the peril involved, whether collectible or not.

Requirements in case loss occurs. The insured shall give immediate written notice to this Company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged and undamaged property, showing in detail quantities, costs, actual cash value and amount of loss claimed; **and within sixty days after the loss, unless such time is extended in writing by this Company, the insured shall render to this Company a proof of loss,** signed and sworn to by the insured, stating the knowledge and belief of the insured as to the following: the time and origin of the loss, the interest of the insured and of all others in the property, the actual cash value of each item thereof and the amount of loss thereto, all encumbrances thereon, all other contracts of insurance, whether valid or not, covering any of said property, any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy, by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of loss and whether or not it then stood on leased ground, and shall furnish a copy of all the descriptions and schedules in all policies and, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged. The insured, as often as may be reasonably required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as may be reasonably required, shall produce for examination all books of account, bills, invoices and other vouchers, or certified copies thereof if originals be lost, at such reasonable time and place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

Appraisal. In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item; and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss. Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.

Company's options. It shall be optional with this Company to take all, or any part, of the property at the agreed or appraised value, and also to repair, rebuild or replace the property destroyed or damaged with other of like kind and quality within a reasonable time, on giving notice of its intention so to do within thirty days after the receipt of the proof of loss herein required.

Abandonment. There can be no abandonment to this Company of any property.

When loss payable. The amount of loss for which this Company may be liable shall be payable sixty days after proof of loss, as herein provided, is received by this Company and ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Suit. No suit or action on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after inception of the loss.

Subrogation. This Company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefor is made by this Company.

ATTACH FORM BELOW THIS LINE

Form No. T2

TORNADO FORM—MERCANTILE PROPERTY

(Standard form West Virginia Fire Underwriters' Association)

$ 22,000. On One story Concrete Block with Steel frame and concrete floor building with and rafters roof, and its additions adjoining and communicating, occupied as a Hangar and known as "City Hangar"

including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all permanent fixtures therein or thereon, situated

on City Air Port, near Morgantown, Monongalia County, West Va.

Windstorm and Hail Endorsement clause #54 attached to policy

$ Nothing On store and office furniture and fixtures of every description, including tools, implements, utensils, floor coverings, shades, fuel, stationery and advertising matter; and on such other fixtures as are not insured with building; all while contained in or attached to the above described building and its additions adjoining and communicating.

$ Nothing On stock of merchandise consisting principally of _____

_____

_____

and other merchandise not more hazardous, the property of the insured; and on the interest of the insured in and/or legal liability for similar property belonging in whole or in part to others, and held by the insured either sold but not removed, on storage or for repairs, or otherwise held, all while contained in the above described building and its additions adjoining and communicating.

This policy does not cover on any item hereunder, unless liability is specifically assumed for an amount set opposite thereto then only for this company's pro rata proportion of each item covered, amounting in the aggregate to the total amount of ance under this policy.

Loss, if any, on building only, payable to _____

terest may appear, subject, nevertheless, to all the conditions of this policy.

EXCLUSIONS:—The following property is excluded from coverage under this contract and in case of loss shall not be

$ Nothing On stock of merchandise consisting principally of _____

_____

_____

and other merchandise not more hazardous, the property of the insured; and on the interest of the insured in and/or legal liability for similar property belonging in whole or in part to others, and held by the insured either sold but not removed, on storage or for repairs, or otherwise held, all while contained in the above described building and its additions adjoining and communicating.

This policy does not cover on any item hereunder, unless liability is specifically assumed for an amount set opposite thereto then only for this company's pro rata proportion of each item covered, amounting in the aggregate to the total amount of ance under this policy.

Loss, if any, on building only, payable to _____

terest may appear, subject, nevertheless, to all the conditions of this policy.

EXCLUSIONS:—The following property is excluded from coverage under this contract and in case of loss shall not be sidered in connection with the application of the reduced rate contribution clause: Automobiles, tractors and other self-pelled vehicles; awnings (fabric); radio towers; signs; standpipes; water towers and/or tanks, and their supports; brick, one or concrete foundations, piers or other supports which are below the under surface of the lowest basement floor, or, where ere is no basement, which are below the surface of the ground; cost of excavations, railroad tracks; underground flues, pipes, nduits and drains; nor personal property in which the interest of the insured is not that of entire ownership.

PRIVILEGES GRANTED:—For other insurance without notice until required; to make ordinary alterations and repairs h the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same.

REDUCED RATE CONTRIBUTION CLAUSE—In consideration of the reduced rate and (or) form under which this policy is written, it is expressly stipulated and made a condition of this contract that in the event of loss this Company shall be liable for no greater proportion thereof than the amount hereby insured bears to fifty (50) _____ per cent of the actual cash value of the property described herein at the time when such loss shall happen, nor for more than the proportion which this policy bears to the total insurance thereon.

In the event that the aggregate claim for any loss is both less than Ten Thousand Dollars ($10,000) and less than five per cent (5%) of the total amount of insurance upon the property described herein at the time such loss occurs, no special inventory or appraisement of the undamaged property shall be required.

If this policy be divided into two or more items, the foregoing shall apply to each item separately.

Attached to and forming a part of Policy No. 262500 of the Royal _____ Insurance Company of New York

issued at its Morgantown, W. Va. Agency. H. F. Marr Agent (s).

SM-7-44

examined plaintiff's insurance policy No. 262500, dated March 22, 1947, and, believing it to be a policy covering fire and lightning, as set forth on the face thereof, and relying upon the statements on the face of plaintiff's said policy No. 262500, made no request for correction in the coverage and made no provision in said budget for premiums of insurance on said hangar except for the premium covering the renewal of policy No. 262500 upon its expiration on March 22, 1948, whereas he would then, in June, 1947, have [fol. 14] made such correction in coverage and would then, in June, 1947, have secured fire insurance coverage on said hangar had he then known or realized that the policy was intended by plaintiff to cover only windstorm and hail.

The plaintiff having represented to defendant that the coverage on the city hangar was that set forth on the face of plaintiff's policy No. 262500, the plaintiff is thereby estopped from denying any liability under its said policy for the coverage indicated on its face, the responsibility for said representation being chargeable to the plaintiff and to its agents and representatives, and not to defendant.

Sixth Defense

The defendant does not know whether the plaintiff, or its agents or representatives, ever discovered, or made any attempt to discover, the alleged mistake now claimed by plaintiff to have been made by it in writing its policy No. 262500. It is true that the alleged mistake now claimed to have been made by the plaintiff in writing its policy No. 262500, was not discovered by the defendant prior to the fire on August 20, 1947, which totally destroyed the said "city hangar".

Any failure to discover the alleged mistake in said policy is chargeable to plaintiff. It is the plaintiff's duty to see that its policies are written correctly and, when mistakes appear therein, to make the necessary corrections. As defendant is informed and believes, plaintiff maintains facilities for checking policies for mistakes and for reporting mistakes to its agents for corrections. It had ample opportunity prior to the fire of August 20, 1947, to discover the alleged mistake in said policy and to make any corrections necessary so that plaintiff's said policy would reflect the contract of insurance it then intended to make with [fol. 15] defendant, if, as plaintiff now says, its said policy was not correctly written.

During the five months that elapsed between the issuance of plaintiff's said policy No. 262500 and the fire which destroyed said hangar, no notice of any error in said policy was ever given to defendant by plaintiff or by its local agent, nor was any attempt made by plaintiff to correct its said policy. During said five months' period, plaintiff had ample facilities and opportunity to discover any error in its said policy and to correct any such error, and any error in plaintiff's said policy is, therefore, chargeable to plaintiff, and plaintiff is thereby estopped from denying liability under its said policy for the coverage specified on the face of its said policy.

Seventh Defense

It is true that on the evening of the 20th day of August, 1947, the said "city hangar" was destroyed by fire, the loss being total. It is true that promptly thereafter, the next morning, August 21, 1947, the defendant, through its City Manager, gave notice of the loss to plaintiff, through its local agent, and on or about September 29, 1947, filed with plaintiff a proof of loss and claim for the full amount designated in said policy.

Defendant denies that its claim is contrary to the actual mutual interest and understanding of the parties and denies that such policy was to cover against loss by windstorm and hail and not against loss by fire. And defendant denies that plaintiff is entitled to have its policy No. 262500 conformed and corrected to make it conform to plaintiff's claim that said policy was to be a windstorm and hail policy and not a fire insurance policy.

Defendant denies that plaintiff is entitled to recover its costs against defendant.

[fol. 16] Counterclaim

And this defendant for counterclaim against the said plaintiff, Royal Insurance Company, Limited, a corporation, says:

The said plaintiff, Royal Insurance Company, Limited, a corporation, issued to City of Morgantown, West Virginia, a municipal corporation, the counterclaiming defendant, a policy of insurance under date of March 22, 1947, insuring against the peril of fire and lightning for a term beginning March 22, 1947 and ending March 22, 1948, the property described therein as "city hangar," situate on the City Airport

near the City of Morgantown, Monongalia County, West Virginia, in the amount of $22,000.00, the said policy providing that it insures to an amount not exceeding the amount specified above against all direct loss by fire and lightning, and August 20, 1947, the said "city hangar" was totally destroyed by fire; that, by virtue of the policy of insurance, a photostatic copy of which is herewith filed, the said Royal Insurance Company, Limited, owes to the City of Morgantown the sum of Twenty-two Thousand Dollars ($22,000.00), for loss in respect to the property insured by said policy caused by fire on or about August 20, 1947, and it demands judgment herein that said Royal Insurance Company, Limited, do pay unto the said City of Morgantown the said sum, with interest thereon from the date said loss was payable to said City under the terms of the policy of insurance, and its costs against said plaintiff herein.

Arch M. Cantrall, 701 Goff Building, Clarksburg, West Virginia, attorney for defendant and counterclaimant.

Dated November 20, 1947.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of attorneys herein.

Clause No. 54
(R.I. 6/46)

WINDSTORM and HAIL ENDORSEMENT

(West Virginia Standard Form)

(This Endorsement to be attached to Standard Policy when the Perils of Windstorm and Hail are covered thereunder)

The following provisions and stipulations contained in lines numbered 1 to 25 are effective only when this policy is written to insure against the perils of Windstorm and Hail but are not effective when liability is assumed under the Extended Coverage Endorsement:

In consideration of the Windstorm and Hail premium shown on the face of this policy, and subject to the provisions and stipulations set forth below and in this policy, including riders and endorsements added thereto, this policy covers direct loss by Windstorm and Hail to an amount not exceeding the amount of Windstorm and Hail insurance specified on the face of this policy. For the purpose only of this Windstorm and Hail insurance the words "Windstorm and Hail" shall be substituted for the words "Fire, Lightning" as appearing in the Insuring Clause on the face of this policy.

This Company shall not be liable for loss caused directly or indirectly by (a) frost or cold weather or (b) snowstorm, tidal wave, high water or overflow, whether driven by wind or not.

This Company shall not be liable for loss to the interior of the building or the insured property therein caused, (a) by rain, snow, sand or dust, whether driven by wind or not, unless the building insured or containing the property insured shall first sustain an actual loss to roof or walls by the direct force of wind or hail and then shall be liable for loss to the interior of the building or the insured property therein as may be caused by rain, snow, sand or dust entering the building through openings in the roof or walls made by direct action of wind or hail or (b) by water from sprinkler equipment or other piping, unless such equipment or piping be damaged as a direct result of wind or hail.

Unless liability therefor is assumed in the form added to this policy, or by endorsement hereon, this Company shall not be liable for damage to the following property; (a) grain, hay, straw or other crops outside of buildings, or (b) windmills, windpumps or their towers, cloth awnings, signs, metal smokestacks, temporary or board roof additions, or (c) buildings (or their contents) in process of construction or reconstruction unless entirely enclosed and under roof with all outside doors and windows permanently in place.

Glass Clause: It is expressly stipulated that only such proportion of the Windstorm and Hail insurance under this policy on any building covers on plate, stained, leaded or cathedral glass therein, as the value of such glass which is damaged bears to the total value of said building.

The provisions and stipulations elsewhere in this policy relating to increase of hazard, vacancy or unoccupancy shall not apply to the Windstorm and Hail insurance hereunder.

Attached to and forming a part of Policy No. 262500 of the

Royal Insurance Company of New York

issued at its Morgantown, W. Va. Agency.

H. F. Marsh Agent (s).

10M-6-45

[17c - p. 16]

Standard Fire Insurance Policy of the States of North Carolina, Virginia and West Virginia

Expires March 22,1948

Property "City Hanger Bldg"

Windstorm (PERIL COVERED) Amount $ 22,000.00

(PERIL COVERED) Amount $

(PERIL COVERED) Amount $

Total Premium $ 44.00

Assured City of Morgantown,

SEE INSIDE OF POLICY FOR PERILS COVERED

No. 262500

EXECUTIVE OFFICES:
150 WILLIAM STREET NEW YORK 8, N. Y.

W. F. NARET, Agent
Phone 6922 217 High Street
MORGANTOWN, W. VA.

It is important that the written portions of all policies covering the same property read exactly alike If they do not they should be made uniform at once

30952

17

Receipt for Return Premium

To be Signed by the Insured.

Agency 19

Dollars

In consideration of ____ receipt of which is hereby acknowledged, this policy is hereby return premium, canceled and surrendered to the Company.

Insured.

No. of Policy

No. of Renewal

Amount Insured $

YEAR	MONTH	DAY

Date of Cancelation

Date of Policy

Time in force

Premium Paid $

Premium Earned at ____ rate $

Premium Returned $

IF PRO RATA, STATE REASON WHY.

[fol. 18] Due, proper and sufficient service of the foregoing answer and counterclaim on the undersigned Donald R. Wilson, attorney for Royal Insurance Company, Limited, by delivering a copy thereof to said attorney on the 22nd day of November, 1947, at his office in the Union Bank Building, Clarksburg, West Virginia, is hereby accepted this 22nd day of November, 1947.

Donald R. Wilson, Attorney for Royal Insurance Company, Limited.

[fol. 19] In United States District Court

Plaintiff's Answer to Defendant's Counterclaim—Filed December 3, 1947

First Defense

The defendant's counterclaim fails to state a claim against the plaintiff upon which relief can be granted.

Second Defense

Answering the several allegations of the defendant's counterclaim, plaintiff says:

(1) It is true that plaintiff issued to defendant a policy of insurance under date of March 22, 1947, insuring, for a term of one year, in the amount of $22,000.00, the so-called "city hangar" situate near the City of Morgantown, Monongalia County, West Virginia; but notwithstanding anything [fol. 20] to the contrary in the written policy contained, it was the mutual intent, agreement, and purpose of the plaintiff and the defendant, as stated in the plaintiff's complaint herein, that such policy was to be and was a policy of windstorm insurance, and not a policy of fire insurance.

(2) It is true that the said "city hangar" was destroyed by fire on August 20, 1947.

(3) The plaintiff denies each, all, and every one of the other allegations of the defendant's counterclaim herein, except as to the allegations of the counterclaim otherwise answered in (1) and (2) above.

Third Defense

The plaintiff's policy No. 262500 issued to the defendant, upon which the defendant's counterclaim is based, was, notwithstanding anything to the contrary in the written policy contained, mutually intended and agreed by and between the plaintiff and defendant to be a windstorm insurance policy, and not a fire insurance policy; and upon reformation and correction of the written policy to conform to such mutual intent and agreement, as prayed for in the plaintiff's complaint herein, there can be no recovery by the defendant upon the policy.

Fourth Defense

The policy of insurance upon which the defendant's counterclaim is based, when properly reformed and corrected by the Court in accordance with the mutual intent [fol. 21] and agreement of plaintiff and defendant, constitutes a windstorm insurance policy, and not a fire insurance policy. The defendant sustained no windstorm loss, and accordingly there can be no recovery on the policy by the defendant.

Wherefore, plaintiff prays that the defendant's counterclaim be dismissed, with costs.

James M. Guiher, Donald R. Wilson, Union Bank Building, Clarksburg, West Virginia, Attorneys for Plaintiff Royal Insurance Company, Limited.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

Acceptance of Service

The undersigned attorney of record for the defendant City of Morgantown, West Virginia, a municipal corporation, does hereby acknowledge service and acceptance of service of a copy of the foregoing Answer of the Plaintiff to the Defendant's Counterclaim, on this the 1st day of December, 1947.

Arch M. Cantrall, Attorney for Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMAND FOR A TRIAL BY JURY—Filed December 11, 1947

City of Morgantown, West Virginia, a municipal corporation, defendant to complaint of Royal Insurance Company, Limited, a corporation, in above styled proceeding for declaratory judgment, and counter-claimant, demands a trial by jury upon the issues raised by the pleadings, agreeable to Rule of Civil Procedure 38(b).

Dated this 10th day of December, 1947.

Arch M. Cantrall, 701 Goff Building, Clarksburg, West Virginia, attorney for defendant and counterclaimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of attorneys herein.

Due, proper and sufficient service of the foregoing demand for trial by jury on the undersigned attorney for Royal Insurance Company, Limited, by delivering a copy thereof to said attorney on the 10th day of December, 1947, at his office in the Union Bank Building, Clarksburg, West Virginia, is hereby accepted this 10th day of December, 1947.

Steptoe & Johnson, Donald R. Wilson, Attorney for Royal Insurance Company, Limited.

[fol. 23] IN UNITED STATES DISTRICT COURT

PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL, AND TO TRY CASE WITHOUT A JURY—Filed March 29, 1948

Plaintiff-Royal Insurance Company, Ltd., a corporation, respectfully moves the Court to strike defendant's demand for jury trial served on December 10, 1947, and to set the action down for trial as an equity case before the Court sitting without a jury, for the following reasons:

1. Plaintiff's action against defendant is for the reformation and correction of a written instrument—i.e., an insurance policy. The action is, therefore, purely equitable in character, and is not properly triable before a jury.

2. The action here being of an equitable character, the right of trial by jury does not exist under the Constitution or statutes of the United States.

3. The issue to be tried in this case—i.e., the right of the plaintiff to have the insurance policy reformed and cor-
[fol. 24] rected to conform to the mutual intent and understanding of the parties—is essentially of such character that it should be tried by the Court and not by a jury.

4. As appears from the pleadings, there is no issue of substance involved in defendant's counterclaim against the plaintiff, separate and apart from the issue of reformation; the disposition of defendant's counterclaim depends solely and entirely upon how the issue is determined in plaintiff's suit against defendant for reformation of the policy. The disposition of the reformation issue in plaintiff's action against defendant will be determinative of the counterclaim, so that there are no separate issue or issues to be tried or litigated under the counterclaim.

There is attached hereto, and made a part hereof, plaintiff's memorandum of authorities in support of this motion.

James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Plaintiff.

Steptoe & Johnson, Union Bank Building, Clarksburg, West Virginia, of Counsel.

[fol. 25] IN UNITED STATES DISTRICT COURT

DEFENDANT'S RESISTANCE TO PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S DEMAND FOR JURY TRIAL AND TO TRY CASE WITHOUT A JURY—Filed April 20, 1948

The defendant, City of Morgantown, West Virginia, a municipal corporation, resists plaintiff's motion to strike said defendant's demand for a jury trial and to set the action down for trial as an equity case before the court sitting without a jury, for the following reasons:

1. Plaintiff's action, while ostensibly for reformation and correction of an insurance policy, is in fact a denial of liability for a total loss by fire and lightning accrued under said policy, the municipal hangar therein insured having been destroyed by fire on August 20, 1947.

2. The plaintiff's remedy by defense to the action on the insurance policy is adequate and complete and, therefore, defendant should not be deprived of its right to trial by jury under the Constitution and Statutes of the United States.

3. The issue herein, an alleged mutual mistake of fact, is one peculiarly suited for determination by a jury and, if this court has a discretion as to whether it will sit as a court of equity in this case, that discretion should not be [fol. 26] exercised in favor of such procedure.

4. The issue to be tried on the counterclaim is a legal issue, viz., liability under a policy of insurance which has become fixed by loss under said policy, and the question raised by plaintiff's action, reformation of the policy to conform to the alleged mutual intent and understanding of the party, is in fact a defense to this claim on the policy, a defense in respect to which no equitable relief is required and right to trial by jury is preserved.

There is attached hereto, and made a part hereof, defendant's memorandum of authorities in support of this resistance of said motions.

Arch M. Cantrall, William G. Stathers, 701 Goff Building, P. O. Box 352, Clarksburg, West Virginia, Attorneys for Defendant and Counter claimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of Attorneys.

[fol. 27] IN UNITED STATES DISTRICT COURT

ORDER SETTING CASE FOR HEARING WITHOUT A JURY—Filed May 3, 1948

On the opening day of this term, April 20, 1948, came the plaintiff by James M. Guiher, its counsel, and came also the defendant by William G. Stathers, of its counsel; and thereupon the matters arising upon the plaintiff's motion theretofore filed to strike the defendant's demand for jury trial, and to set this case down for trial before the Court sitting without a jury, to which motion of the plaintiff the defendant had theretofore filed its written resistance, was argued by counsel. And the Court, having now maturely

considered the matters arising upon said motion, is of opinion that the said motion of the plaintiff should be sustained. Accordingly it is

Ordered that the plaintiff's said motion to strike the defendant's demand for jury trial, and to set this action down for trial as a non-jury case be, and it is hereby, sustained; and that this action shall be set down for trial before [fol. 28] the Court sitting without a jury on a date to be hereafter fixed by the Court.

Enter on this the 3rd day of May, 1948.

W. E. Baker, United States District Judge.

[fol. 29] In United States District Court

Notice of Appeal to Circuit Court of Appeals—Filed May 15, 1948

Notice is hereby given that City of Morgantown, West Virginia, a municipal corporation, defendant above named, and counterclaimant herein, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the order sustaining plaintiff's motion to strike defendant's demand for jury trial, and to set this case down for trial before the court sitting without a jury, and setting said case for trial before the court sitting without a jury, entered in this action on May 3, 1948.

Arch M. Cantrall, W. G. Stathers, 701 Goff Building, P. O. Box 352, Clarksburg, West Virginia, Attorneys for Defendant and Counter-claimant.

Stathers & Cantrall, 701 Goff Building, Clarksburg, West Virginia, of Attorneys herein.

[fol. 30] In United States District Court

Stipulation as to Record—Filed May 27, 1948

In order to facilitate the preparation of the record on appeal, the undersigned parties hereby designate the parts of the record and proceedings to be included in the record on appeal, pursuant to Rule 75(f) of the Rules of Civil Procedure:

1. The Summons.

2. The Complaint.

3. The Answer and Counterclaim.

4. Plaintiff's Answer to Defendant's Counterclaim.

5. Defendant's Demand for a Trial by Jury.

6. Plaintiff's Motion to Strike Defendant's Demand for Jury Trial and to Try case without a Jury.

7. Defendant's Written Resistance to Plaintiff's Motion to Strike Demand for Jury Trial and to Try Case without a Jury.

8. The Order Entered Herein on May 3, 1948, from which defendant appeals.

Stipulated and agreed to on this the 20 day of May, 1948. James M. Guiher, Attorneys for Royal Insurance Co., Limited, Plaintiff. W. G. Stathers, Attorney for City of Morgantown, Defendant.

[fol. 31] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 32] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Appellant,

versus

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling.

June 1, 1948, the transcript of record is filed and the cause docketed.

APPEARANCE

June 5, 1948, the appearance of James M. Guiher is entered for the appellee.

[fol. 33] IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

[Title omitted]

NOTICE OF MOTION TO DISMISS APPEAL—Filed June 5, 1948

To Appellant City of Morgantown, West Virginia, a Municipal Corporation:

Notice is hereby given that on Monday, the 28th day of June, 1948, at 10:00 a.m., Asheville Time, at the argument room of the Circuit Court of Appeals in the Federal Building in the City of Asheville, North Carolina, Royal Insurance Company, Limited, appellee herein, will bring on for hearing, before the United States Circuit Court of Appeals for the Fourth Circuit then in regular session sitting, the attached motion to dismiss the appeal in this action.

Dated this the 4th day of June, 1948.

(Signed) James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Appellee.

Steptoe & Johnson, Clarksburg, West Virginia, of Counsel.

[fol. 34] IN UNITED STATES COURT OF APPEALS

[Title omitted]

APPELLEE'S MOTION TO DISMISS APPEAL—Filed June 5, 1948

To the Honorable Judges of the United States Circuit Court of Appeals for the Fourth Circuit:

Royal Insurance Company, Limited, a corporation, Appellee herein, respectfully moves that this appeal by City of Morgantown, West Virginia, a municipal corporation, Appellant herein, from an order entered by the United States District Court for the Northern District of West Virginia at Wheeling, on May 3, 1948, which appeal was docketed in the office of the Clerk of this Court on June 1, 1948, be dismissed for the following reasons:

1. This is a suit for the reformation of a written instrument—i.e., an insurance policy—and involves no issues [fol. 35] of fact, either in the main action or on the counter-

claim, aside from the purely equitable issue of reformation. The District Court's order of May 3, 1948, appealed from did nothing more than deny a jury trial of such issue, and set the equitable issue down for trial before the Court sitting without a jury. Thus, the order appealed from is wholly interlocutory, and is not a final order from which an appeal can be taken.

2. The order of May 3, 1948, appealed from is not an interlocutory order from which an appeal can be taken under Section 129 of the Judicial Code, 28 *U.S.C.A.* 227.

3. The District Court's order of May 3, 1948, is not an appealable order.

4. The present appeal is premature.

(Signed) James M. Guiher, Union Bank Building, Clarksburg, West Virginia, Attorney for Appellee.

Steptoe & Johnson, Clarksburg, West Virginia, of Counsel.

[fol. 36] ACCEPTANCE OF SERVICE

The undersigned attorney of record for City of Morgantown, West Virginia, a municipal corporation, appellant herein, does hereby acknowledge receipt and service of copies of the foregoing notice and motion of the appellee to dismiss the appeal herein, on this the 4th day of June, 1948.

(Signed) W. G. Stathers, Attorney for Appellant.

[fol. 37] IN UNITED STATES COURT OF APPEALS

June 10, 1948, the appearance of W. G. Stathers, Arch M. Cantrall and Mary Frances Brown is entered for the appellant.

Same day, statement under section 3 of rule 10 is filed.

June 12, 1948, brief of appellee in support of motion to dismiss appeal is filed.

June 21, 1948, brief of appellant resisting motion to dismiss appeal is filed.

ARGUMENT ON MOTION

June 28, 1948, (June term, 1948) cause came on to be heard on the motion of the appellee to dismiss appeal before Parker and Dobie, Circuit Judges, and Prettyman, Associate Justice United States Court of Appeals for the District of Columbia, and was argued by counsel and submitted.

[fol. 38] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a municipal corporation, Appellant,

versus.

ROYAL INSURANCE COMPANY, LIMITED, a corporation, Appellee

Appeal for the District Court of the United States for the Northern District of West Virginia, at Wheeling

OPINION— August 31, 1948

Argued June 28, 1948

Before Parker and Dobie, Circuit Judges, and Prettyman, Associate Justice United States Court of Appeals for the District of Columbia.*

[fol. 39] Mary Frances Brown (W. G. Stathers and Arch M. Cantrall on brief) for the appellant, and James M. Guiher (Steptoe & Johnson on brief) for the appellee.

PARKER, Circuit Judge:

This is a motion to dismiss an appeal from an order of the District Court denying a jury trial. The suit was instituted in the court below to reform a policy of insurance on the ground of mutual mistake, the contention of plaintiff being that a policy of insurance, which it had issued on a hangar at an airport, was intended to cover loss by windstorm and hail and premium was paid on that basis but that by mutual mistake the policy was written to cover fire and lightning, which takes a much higher premium. Answer

*Sitting by special assignment.

was filed denying the allegations of the complaint and asking, by way of counterclaim, recovery on the policy for the destruction of the insured property by fire. Defendant filed demand for the trial of the issues before a jury; and from an order denying the jury trial and setting the case down for hearing before the judge, the defendant has appealed. The matter is before us on motion to dismiss the appeal.

The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law. *Clarksburg Trust Co.* v. *Commercial Casualty Ins. Co.* 4 Cir. 40 F. 2d 626, 629; [fol. 40] *Great American Ins. Co.* v. *Johnson* 4 Cir. 25 F. 2d 847, 848; *Toucey* v. *New York Life Ins. Co.* 8 Cir. 102 F. 2d 16, 21.

What we have is a pure case of reformation of a policy on the ground of mistake, a matter of which equity had exclusive jurisdiction under the old practice. *Union Mutual Life Ins. Co.* v. *Mowry* 96 U. S. 544, 547. No distinction exists between reforming the policy as a basis of suit and reforming it for the assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written and parol evidence to add to, alter or deny its terms is not admissible. See *Alleghany Valley Brick Co.* v. *Raymond* 2 Cir. 219 F. 417; *Garage Equipment Co.* v. *Danielson* 156 Wis. 90, 144 N. W. 184; *A. L. I. Restatement of Contracts* vol. 2 sec. 504. The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co.* v. *Saxe*, App. D. C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy at law, *Phoenix Mutual Life Ins. Co.* v. *Bailey* 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties.

Since the issue in the case was clearly one solely cognizable in equity under the old practice, the defendant had no right to a jury trial of the issue as a matter of right under the Rules of Civil Procedure. Rule 38. And even if the order allowing jury trial were appealable, the motion to dismiss might well be allowed on the ground that the [fol. 41] appeal presents no question of substance.

We think, however, that the order is not appealable. The case is not one like *Ettelson* v. *Metropolitan Life Ins. Co.* 317 U. S. 188, or *Enelow* v. *New York Life Ins. Co.* 293 U. S. 379, where an equitable defense was asserted to a law action and the relief asked was in effect that the prosecution of the action at law be enjoined. Here suit in equity has been filed asking the equitable relief of reformation for mutual mistake, and defendant is seeking to have the equitable issue tried before a jury at law and is appealing because the court has denied a motion to that effect. It is true that defendant has filed a counterclaim asking recovery on the policy, and that, if plaintiff's prayer for reformation is denied defendant will be entitled to judgment on this legal counterclaim; but there is nothing in this which makes the denial of jury trial a final order or which can be construed as the granting of an interlocutory injunction against suit on the counterclaim. See *Beaunit Mills* v. *Eday Fabric Sales Co.* 2 Cir. 124 F. 2d 563. There is no reason why any question as to the correctness of the order as to jury trial should not have been presented on appeal from final judgment as was done in the case of *Prudential Ins. Co.* v. *Saxe, supra:* 134 F. 2d 16.

Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing [fol. 42] the course of litigation. We have given short shrift to such dilatory appeals in other cases. See *Bowles* v. *Commercial Casualty Ins. Co.* 4 Cir 107 F. 2d 169 and cases there cited. There is no reason to encourage them by any such forced interpretation of the statute relating to appeals

from interlocutory injunctions as we would have to make to sustain the appeal here.

Appeal Dismissed.

[fol. 43] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5764

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Appellant,

vs.

ROYAL INSURANCE COMPANY, LIMITED, a Corporation, Appellee

Appeal from the District Court of the United States for the Northern District of West Virginia

ORDER OF DISMISSAL—August 31, 1948

This Cause came on to be heard on the motion of the appellee to dismiss the appeal herein, and was argued by counsel.

On Consideration Whereof, It is now here ordered by this Court, for the reasons set forth in the opinion filed herein, that the appeal in this cause be, and the same is hereby, dismissed with costs.

John J. Parker, Senior Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge. E. Barrett Prettyman, Associate Justice, U. S. Court of Appeals for the District of Columbia.

September 27, 1948, petition of appellant for a stay of mandate is filed.

[fol. 44] IN UNITED STATES CIRCUIT COURT OF APPEALS

ORDER STAYING MANDATE—Filed October 2, 1948

Upon the Petition of the appellant, by its counsel, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending

the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

John J. Parker, Chief Judge Fourth Circuit.

October 1st, 1948.

[fol. 45] In United States Court of Appeals

Order Authorizing Clerk to Use Original Transcript of Record In Making Up Record for Use in the Supreme Court of the United States on Application for Writ of Certiorari

Order

For Reasons Appearing to the Court,

It Is Ordered that the Clerk of this Court, in making up certified transcripts of records for use in the Supreme Court of the United States on applications for writs of certiorari to this Court, be, and he is hereby, authorized to use and incorporate therein the original transcripts of records filed in this Court. The said original transcripts of records shall be returned to this Court after the cases are finally disposed of in the said Supreme Court.

Further Ordered that a copy of this order be incorporated in said certified transcripts of records.

John J. Parker, Senior Circuit Judge.

January 9th, 1941.

[fol. 46] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1948

No. 396.

CITY OF MORGANTOWN, WEST VIRGINIA, a Municipal Corporation, Petitioner,

vs.

ROYAL INSURANCE COMPANY, Limited

ORDER ALLOWING CERTIORARI—Filed December 13, 1948

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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